Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DEAN M. CRIST,

Petitioner,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, MICHAEL ALLEN, WA-SWA-GON TREATY ASSOCIATION, THOMAS MAULSON, ROBERT MARTIN, NICK HOCKINGS, and GILBERT CHAPMAN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Chippewas' theory of usufructuary fishing rights in lands ceded to the United States government consistent with their receipt of compensation from the Indian Claims Commission for loss of those rights?

2. Can the district court constitutionally base a finding of unlawful racial animus under 42 U.S.C. §1982 on political speech directed against the Chippewa by petitioner?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
PREVIOUS OPINIONS	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT	7
I.	
THE JUDGMENT OF THE DISTRICT COURT IN THIS CASE IS TAINTED BY ITS REFUSAL TO CONSIDER THE LEGAL EFFECT OF THE CHIPPEWA'S RECEIPT OF COMPENSATION FROM THE INDIAN CLAIMS COMMISSION ...	7
A. *Res Judicata* Should Not Have Applied to the Proposed Affirmative Defenses	8
B. The Chippewa's Position in the Indian Claims Commission Is Clearly Inconsistent with Their Position in *Voigt* and the Instant Case	10
II.	
THE DISTRICT COURT'S FINDING OF RACIAL ANIMUS BASED UPON PURELY POLITICAL SPEECH WILL HAVE A SEVERELY CHILLING EFFECT ON ALL FUTURE POLITICAL PROTEST	12
CONCLUSION	15
APPENDIX	*infra*

TABLE OF AUTHORITIES

Cases	PAGE
Chaveriat v. Williams Pipe Line Co., 3 F.3d 1420 (7th Cir. 1993)	9
Cohen v. California, 403 U.S. 15 (1971)	15
Havasupai Tribe v. United States, 752 F.Supp. 1471 (D. Ariz. 1990)	9
Hess v. Indiana, 414 U.S. 105 (1973)	15
Jenson v. Eveleth Taconite Co., 824 F.Supp. 847 (D. Minn. 1993)	13
Lac Courtes Oreilles etc. v. Voigt, 700 F.2d 341 (7th Cir. 1983)	2, 4
Lac Courtes Oreilles v. Voigt, 653 F.Supp. 1420 (W.D. Wis. 1987)	4
Lac Du Flambeau v. Stop Treaty Abuse—Wisconsin, 781 F.Supp. 1385 (W.D. Wis. 1992)	5
Lac Du Flambeau v. Stop Treaty Abuse—Wisconsin, 991 F.2d 1249 (7th Cir. 1993)	5
Lac Du Flambeau v. Stop Treaty Abuse—Wisconsin, 843 F.Supp. 1284 (W.D. Wis. 1993)	6
Lac Du Flambeau v. Stop Treaty Abuse—Wisconsin, 41 F.3d 1190 (7th Cir. 1994)	6
Minnesota Chippewa Tribe, et al. v. U.S., 32 Ind. Cl. Comm. 142 (1973); 41 Ind. Cl. Comm. 102 (1977); 41 Ind. Cl. Comm. 249 (1978)	10
Morton v. Mancari, 417 U.S. 535 (1974)	14
Texas v. Johnson, 491 U.S. 397 (1989)	15
United States v. Dann, 470 U.S. 39 (1985)	3, 11
White Mountain Apache Tribe v. Clark, 604 F.Supp. 185, *aff'd* 784 F.2d 921 (9th Cir. 1986); *cert. den.*, 479 U.S. 1006	9

Statutes

25 U.S.C. §70(a) 1
42 U.S.C. §1982 13
42 U.S.C. §1988 13

Other Sources

Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction §4426 (1981) 10

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PREVIOUS OPINIONS

There have been two reported district court opinions and two reported Court of Appeals opinions in this case. The full text of each is set forth in the Appendix. All may be cited as *Lac Du Flambeau, et al. v. Stop Treaty Abuse - Wisconsin, et al.* The citations are as follows:

1. 781 F.Supp. 355 (W. D. Wis. 1992);
2. 991 F.2d 1249 (7th Cir. 1993);
3. 843 F.Supp. 1284 (W. D. Wis. 1994);
4. 41 F.3d 1190 (7th Cir. 1994).

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision in this case on December 10, 1994. No petition for rehearing was filed.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

25 U.S.C. § 70(a) (Repealed);

42 U.S.C. § 1982; 42 U.S.C. § 1988

(statutory texts are reprinted in full in the Appendix)

STATEMENT OF THE CASE

Course of Proceedings

The respondents-plaintiffs, Lac Du Flambeau Band of Lake Superior Chippewa Indians, Michael Allen, Wa-Swa-Gon Treaty Association, Thomas Maulson, Robert Martin, Nick Hockings, and Gilbert Chapman (collectively "plaintiffs" or "the Chippewa") filed a complaint against defen-

dant Stop Treaty Abuse-Wisconsin and defendant-petitioner Dean Crist ("defendants") in the United States District Court for the Western District of Wisconsin. Plaintiffs sought injunctive relief against the defendant organization and its spokesman, Crist, to prevent them from interfering with their off-reservation spearfishing and gillnetting activities. They based their claims upon 42 U.S.C. §§1982; 1983, 1985(3) and 1986.

After plaintiffs were granted a preliminary injunction, the district court entered summary judgment, finding that defendants' interference with plaintiffs' "rights" was based upon racial animus against Native Americans. The Seventh Circuit Court of Appeals reversed and remanded, holding that defendants' motivation was a question of fact.

Following a bench trial, the district court once again ruled for the plaintiffs, and entered a permanent injunction against defendants. The Seventh Circuit affirmed this decision.

The Chippewa Treaties with the United States

Most of the historical facts set forth below are derived from the discussion in *Lac Courtes Oreilles etc. v. Voigt*, 700 F.2d 341 (7th Cir. 1983).

The plaintiffs are one of the bands of Chippewa Indians in the Upper Midwest/Western Great Lakes region. In 1837 and 1842, the Chippewa entered into several treaties with the United States government. These treaties ceded large amounts of tribal land to the government in exchange for substantial compensation. The Chippewa spokesmen advised the government's negotiator that the band wished to continue to fish and hunt on the ceded lands.

Pursuant to this request, Article V of the Treaty of 1837 between the Chippewa and the government provides:

> The privilege of hunting and fishing . . . upon the [ceded lands] is guarantied [sic] to the Indians during the pleasure of the President of the United States.

A similar treaty was entered in 1842 with the Chippewa of Lake Superior and the Mississippi.

In 1850, the President issued an Executive Order rescinding the privileges of hunting, fishing and gathering granted by the 1837 and 1842 treaties.

The Indian Claims Commission

By legislation passed in 1946, Congress created the Indian Claims Commission to hear the claims of any tribe, band or group of American Indians against the federal government. Congress intended to provide final and complete settlement of all claims. Congress delegated its previous responsibility in this area to the Commission. *United States v. Dann*, 470 U.S. 39, 45-48 (1985).

The Lake Superior Chippewa brought several claims of "unconscionable consideration" pursuant to the 19th Century treaties. The decision of the Indian Claims Commission included as one of the items for which compensation was sought the "natural resources" on the ceded land. Included among the natural resources were "its climate, vegetation, including timber, *game and wildlife*, mineral resources . . ." (Doc. No. 310; Aff. of R. Sommer).

In a claim under the Treaty of 1842, the value of fish in the lakes and streams of the ceded land is explicitly recognized (Docket No. 18-S). The United States included among its proposed findings of fact recognition of the fishery present in the area. In its findings of fact with respect to the area ceded in 1842, the Claims Commission allotted a value to the waters of the area, which of necessity includes the fish present in the water, for which the Chippewa were awarded additional compensation. (*Id.*; Exhs. to Aff.)

Lac Courtes Oreilles v. Voigt

In the late 1970s, the Lac Courtes Oreilles band of Chippewa filed a declaratory judgment action to establish that the Lake Superior Chippewa retained treaty-based rights to fish, hunt and gather in their traditional manner, which in some respects violated Wisconsin state regulations. The district court granted summary judgment for the defendants (basically, the State of Wisconsin), based upon an 1854 treaty establishing Chippewa reservations. However, the Seventh Circuit Court of Appeals reversed (*Lac Courtes Oreilles v. Voigt*, 700 F.2d 341 (7th Cir. 1983)), holding that neither the Executive Order of 1850 nor the Treaty of 1854 extinguished the Chippewa's usufructuary rights on the ceded land.

Following remand, the ultimate decision of the district court with respect to usufructuary rights was that the Lac Courtes Oreilles had the right to hunt and fish on the ceded land with any techniques they desired, but could not hunt or fish on privately-owned ceded land. *Lac Courtes Oreilles v. Voigt*, 653 F.Supp. 1420, 1435 (W.D. Wis. 1987).

The Instant Litigation

Shortly after the *Lac Courtes Oreilles* decision authorized the use of *any* methods for exercise of the Chippewa's usufructuary fishing "rights", defendants and other groups began gathering at lakes in northern Wisconsin to protest spearfishing and gillnetting of walleyed pike and muskellunge, two of the more popular sport fish for rod and reel fishermen in northern Wisconsin. Defendants objected to the Chippewa's supposed right to avoid Wisconsin Department of Natural Resources' limitations on methods and quantities of fishing.

Rather than burdening this court with the voluminous trial record regarding the protests at the lakes and land-

ings, petitioner simply commends this court to the district court and the Seventh Circuit opinions, all of which are reproduced in the Appendix to this petition.

Plaintiffs filed this action to enjoin the interference with their fishing rights (Doc. No. 2). The district court granted a preliminary injunction (Doc. No. 88).

Prior to a hearing on the plaintiffs' motion for summary judgment and a permanent injunction, defendants sought leave to file affirmative defenses challenging plaintiffs' claim that they had any rights to protect under 42 U.S.C. §1982 (Docs. Nos. 248; 329). This argument was based upon the resolution of the Chippewa's claims before the Indian Claims Commission. Plaintiffs moved to strike the affirmative defense based upon untimeliness with the district court's pretrial scheduling order and because of the supposed *res judicata* effect of *Lac Courtes Oreilles v. Voigt.*

The district court granted summary judgment to the plaintiffs. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 781 F.Supp. 1385 (W. D. Wis. 1992). The court agreed that the Indian Claims Commission defense was barred by *res judicata. Id.* at 1388. The court found no issues of fact with respect to defendants' racial motivation for interfering with the plaintiffs' rights and entered a permanent injunction. The Seventh Circuit reversed, holding that defendants' racial animus was a question of fact to be tried to the court, and remanded. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 991 F.2d 1249 (7th Cir. 1993). As to defendants' affirmative defenses, the Seventh Circuit held that the district court had discretion to deny leave to amend the pleadings as untimely, even though the district court did not explicitly rely on untimeliness. At the same time, the court, *in dictum*, stated that the Indian Claims Commission's argument was an improper collateral attack on the *Voigt* case. *Id. at* 1256-57.

Following a bench trial, the district court again held for plaintiffs, and permanently enjoined defendants from:

A. Assaulting or battering any member of the Lac Du Flambeau band or any member of the family of a Lac Du Flambeau band member at any landing or on any lake within the ceded territory;

B. Intentionally creating wakes on any waterway to interfere with any spearer;

C. Planting decoys in any waterways;

D. Intentionally blocking spearing boats from moving from the boat landings out to the spawning beds;

E. Shining lights into the eyes of any spearer or spearing boat operator while on the water;

F. Playing "leap frog" with any spearing boat, or otherwise impeding the progress of any spearing boat; and

G. Taking any other action that is intended to or may reasonably be expected to interfere with plaintiffs' exercise of their spearing rights, including blowing whistles at spearers or any members of their families. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 843 F.Supp. 1284, 1295 (W.D. Wis. 1993).

The district court also entered judgment for plaintiffs against defendants for attorneys fees under 42 U.S.C. §1988, in the amount of $82,647, which supplemented the award of $159,194.50 for previous work.

The Seventh Circuit affirmed the decision of the district court. The court found that that district court's decision regarding defendants' racial motivation was not clearly erroneous. It also affirmed the attorney fee award. *Lac Du Flambeau v. Stop Treaty Abuse - Wisconsin*, 41 F.3d 1190 (7th Cir. 1994).

ARGUMENT

I.

THE JUDGMENT OF THE DISTRICT COURT IN THIS CASE IS TAINTED BY ITS REFUSAL TO CONSIDER THE LEGAL EFFECT OF THE CHIPPEWA'S RECEIPT OF COMPENSATION FROM THE INDIAN CLAIMS COMMISSION.

Political correctness is an insufficient reason for ignoring the truth.

In 1983, the State of Wisconsin appealed the decision of the Western District of Wisconsin which allowed the Lac Courtes Oreilles band of Chippewa to spearfish and gillnet on the lands ceded by the tribe to the United States. The State *never argued* in either the district court of the court of appeals that the Lac Courtes Oreilles had no treaty-based right to spearfish or gillnet on lands other than their reservations because of a prior judgment of the Indian Claims Commission, in which the Chippewa claimed, and were awarded, compensation for the loss of the fishery and waters on the ceded lands.

In this case, before the summary judgment which was the subject of the first appeal, the defendants sought leave to file affirmative defenses and other pleadings asserting that no claim could be brought for interference with property rights under 42 U.S.C. §1982, because no such rights existed, the Chippewa having recognized the prior transfer of those rights by submitting claims to the Indian Claims Commission for inadequate compensation.

The district court refused to even consider the issue.[1]

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[1] The Seventh Circuit disingenuously stated that the district court properly exercised its discretion in refusing to allow a late pleading. The district court exercised no such discretion; its discussion in the order granting summary judgment relates only

(continued...)

Crist's plea to this court is simple: this issue is too important, both in its specific application to the natural resources of northern Wisconsin, and its general application to the finality and preclusive effect of special, congressionally-mandated proceedings, to eliminate based upon an and awkward and unjust extension of the doctrine of *res judicata*.

The district court, in its order denying leave to file pleadings relating to the Indian Claims Commission, did not bother to analyze the implications of its decision. It simply held that the matter was concluded by the 1983 *Voigt* litigation.

A. *Res Judicata* Should Not Have Applied to the Proposed Affirmative Defenses.

What the district court conveniently overlooked is that the plaintiffs, although similarly-situated, are not the same in the two litigations; the defendants are different (Crist and Stop Treaty Abuse-Wisconsin, as opposed to the State of Wisconsin). Moreover, there is not a pure identity of issues between the two cases. In the first case, the issue was whether the 19th Century treaties and executive orders extinguished *all* Chippewa fishing rights in the ceded lands. The issue defendants sought to raise in the instant litigation is whether the Chippewa could continue to assert treaty rights after receiving an award of additional compensation from the Indian Claims Commission.

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[1] (...continued)
to the plaintiffs' claim that the *Voigt* decision precludes litigation of this issue. *Compare*, 781 F.Supp. at 1388 and 991 F.2d at 1256-57. The procedural burying of this issue by the court of appeals allowed it to conveniently overlook the merits in the first appeal, and effectively precluded review in the second appeal, which related only to the issue of racial animus.

Additionally, there is a significant question of adequate representation of the defendants in the instant case by the State of Wisconsin in the *Voigt* case. As representatives of the State of Wisconsin seeking to protect important natural resources, it was incumbent upon the Attorney General to become acquainted with all aspects of case. Somehow, the Attorney General failed to recognize that the subject of Chippewa rights with respect to fishing in the ceded lands had been the subject of litigation and compensation before a government body with the power to enter a preclusive judgment. *Havasupai Tribe v. United States*, 752 F.Supp. 1471 (D. Ariz. 1990); *White Mountain Apache Tribe v. Clark*, 604 F.Supp. 185, 187-89, *aff'd* 784 F.2d 921 (9th Cir. 1986); *cert. den.*, 479 U.S. 1006 (recognizing broad preclusive effect of matters which were or could have been raised before the Indian Claims Commission).

Finally, other element of *res judicata* are not present. For example, there is no identity of issues in this case. The *Voigt* case resolved whether the Chippewa had lost the right to fish in their traditional manner by virtue of the presidential order revoking their rights and the treaty moving them on to reservations. The instant case, assuming all affirmative defenses are in place, uses *Voigt* as a factual predicate, but concerns the effect of the Indian Claims Commission award upon the Chippewa's right to fish and hunt in the traditional manner on the ceded lands.

In fact, this raises one of the bitter ironies in this case. The Chippewa received compensation premised upon the idea that they had been unfairly compensated for what they gave up from the ceded lands. The Chippewa should have been *judicially* estopped in the *Voigt* case from arguing that they retained treaty-based fishing rights in the ceded lands, when they had received compensation for having lost those rights. *Chaveriat v. Williams Pipe Line Co.*, 3 F.3d 1420

(7th Cir. 1993) (party may not repudiate a position in second litigation upon which it prevailed in prior litigation). The irony is that the Chippewa raised one form of preclusion (*res judicata*) to defeat a clear defense based upon another type of preclusion (judicial estoppel).

If anything, the unfairness of the Chippewa taking inconsistent positions calls for the "interest of justice" exception to *res judicata*. See Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction §4426 (1981). Even if this Court believes the Chippewa rights are established because of the *Voigt* decision, the unfairness of allowing them to profit from one position in litigation, and then repudiate that position in subsequent litigation, should be not attenuated if one litigant (the State of Wisconsin) fails to call this unfairness to one court's attention.

B. The Chippewa's Position in the Indian Claims Commission Is Clearly Inconsistent with Their Position in *Voigt* and the Instant Case.

The nature of the Chippewa claims before the Indian Claims Commission, and the compensation which they received, are clearly inconsistent with their claim of continuing treaty rights.

Claims by the Lake Superior Chippewa were brought before the Commission in Docket Nos. 18-C, 18-S and 18-U in which the Chippewa contended that the Treaties of 1837, 1842 and 1854 provided "unconscionable consideration" for the loss of the ceded land. The Commissioner found for the Chippewa and awarded them additional compensation in the total amount of over $20 million. *See, generally, Minnesota Chippewa Tribe, et al. v. U.S.*, 32 Ind. Cl. Comm. 142 (1973); 41 Ind. Cl. Comm. 102 (1977); 41 Ind. Cl. Comm. 249 (1978).

The treaties of 1837 and 1842 ceded lands in which the Lake Superior Chippewa retained the right to hunt, fish and gather wild foods at the pleasure of the president of the United States. By treaty of 1854, the Chippewa were moved onto reservations.

After the establishment of the Indian Claims Commission, which had the power to fully and finally resolve all Indian claims against the government (*United States v. Dann*, 470 U.S.39 (1985)), the Chippewa sought compensation for inadequate consideration for the loss of certain rights on the ceded lands. The record of the Commission decision shows that one of the elements of value on which the Commission relied in reaching its conclusion was the "natural resources" on the land. Included within that general category are "its climate, vegetation, including timber, game and wildlife, mineral resources. . ." Thus, by compensating the Chippewa for the loss of fish and game within the ceded territory, the Chippewa recognized that they had given up treaty-based rights in those resources.

Perhaps even more explicit is the record of the Commission in Docket No. 18-S, relating to lands ceded by the Treaty of 1842. In that docket, the value of fish in the lakes and streams of the ceded land is explicitly recognized in the records. The defendant United States included among its proposed findings of fact recognition of the "fishery" present in the area. In its findings of fact with respect to the area ceded in 1842, the Commission allotted a value to the waters of the area, which necessarily included the fish present and for which the Chippewa were awarded additional compensation.

It is not Crist's intention at this point in the proceedings to secure a determination that the Chippewa have *no* right to fish or hunt in the ceded land. That is not the issue in this case. The issue is whether the "right" to fish and hunt

in the traditional Chippewa manner, recognized in the *Voigt* case, is consistent with a claim that the Chippewa lost such rights, necessitating compensation, by virtue of the cessation of the lands through the 1837, 1842 and 1854 treaties.

In summary, there is little doubt from the records of the Indian Claims Commission that the Chippewa were compensated for loss of fishing resources in the ceded lands. Because the judgment of the Indian Claims Commission had the force of a judgment of the United States Court of Claims, it fully and finally disposed of all claims under the 19th-Century treaties. This point was not precluded by means of *res judicata*; the parties are different, the issues are different, and the defendants' interests were inadequately represented by the State of Wisconsin in the *Voigt* case.

Both the Chippewa and non-Chippewa community in Northern Wisconsin have been embroiled in disputes for over a decade because of a rogue decision (*Voigt*) which creates dangerous inequalities among citizens and threatens a vital resource. This court should grant *certiorari* to resolve this critical issue.

II.

THE DISTRICT COURT'S FINDING OF RACIAL ANIMUS BASED UPON PURELY POLITICAL SPEECH WILL HAVE A SEVERELY CHILLING EFFECT ON ALL FUTURE POLITICAL PROTEST.

A cursory reading of the district court's findings of fact with respect to petitioner Crist demonstrates that Crist is a political adversary of the Chippewa. His views are clear: he believes that between the incorrectness of *Voigt* and the effect of the Indian Claims Commission proceedings, the Chippewa had no right to spearfish or gillnet in the ceded

lands and has devoted a substantial amount of his adult life to promoting that viewpoint. People may disagree as to whether Crist's advocacy represents a deep and abiding concerning for the natural resources of northern Wisconsin or anti-Chippewa animus. The answer to that question, however, is not the point of Crist's First Amendment argument.

The First Amendment becomes a factor in this case because the plaintiffs have taken Crist's advocacy of limited Chippewa fishing rights, squeezed their grievance into the amorphous confines of a civil rights claim and, combined with attorney fee liability under 42 U.S.C. §1988, driven him towards financial ruin. This has all taken place without a shred of evidence of anti-Chippewa animus except for Crist's taking a leading role in the protests. Such a result places an undue burden on plainly political speech.

Crist is not attacking 42 U.S.C. §1988 or 42 U.S.C. §1982 as unconstitutional on their faces. Rather, it is the specter of enormous financial liability under these statutes for strenuously advocating a political position which implicates the First Amendment because of the chilling effect on speech.

Crist recognizes that spurious First Amendment claims have been rejected when raised by defendants accused of racially or sexually harassing speech. *See, e.g., Jenson v. Eveleth Taconite Co.*, 824 F.Supp. 847 (D. Minn. 1993) (n. 89). The key difference between the situations is *context*. The sexual harasser who claims that the First Amendment protects him from liability for making crude and offensive statements to women is not engaged in political activity. If anything, sexual or racially harassing expression may more properly be classified as unprotected utterances, such as obscenity or fighting words. Such words have no political,

educational, literary or informative content. Or, as in *Jenson*, the expression may be considered as part of the unlawful conduct.

But the record unmistakably demonstrates that any "racially" derogatory expressions by Crist (and there was no real evidence of such remarks) were all in the context of a political controversy pitting Crist and his followers against adversaries who, by definition, were all part of a group arguably protected by the civil rights statutes.[2]

The chilling effect of attorney fee liability for political protest under the civil rights statutes is onerous and portentous for others. Every organizer of protests against rights supposedly held by groups protected by the civil rights statutes will be stifled by the threat of an attorney fee judgment. For example, if a white contractor leads a protest against minority set-asides, and that protest interferes with a minority contractor's work, the contractor could theoretically sue the organizer under 42 U.S.C. §1982, take the case to trial and, through an attorney fee judgment, bankrupt the contractor.

The point of this example is that the civil rights statutes, passed in the 19th Century and long before 42 U.S.C. §1988 came into play, were not meant to stifle political protests. But an extreme definition of property under 42 U.S.C. §1982 and the threat of liability for attorney fees under 42 U.S.C. §1988 will impermissibly choke political expression so long as the object of the political protest is a protected minority. The marketplace of ideas becomes one-sided; only

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[2] Under *Morton v. Mancari*, 417 U.S. 535 (1974), it is doubtful whether a federally recognized Indian tribe, which is a political organization, constitutes a "race" or "national origin." *Id.* at 553-54, n.24.

the politically correct may speak out without fear of governmental consequences.

This Court has long expressed solicitude for free and open political debate, even in the cauldron of public disorder. *Hess v. Indiana*, 414 U.S. 105 (1973); *Cohen v. California*, 403 U.S. 15 (1971); *Texas v. Johnson*, 491 U.S. 397 (1989). The difference between these cases (criminal sanctions versus civil liability) is insignificant. Crist engaged in adversarial political protest. Because the subjects of his protest belonged to a supposedly-protected minority group, he stares down the barrel of personal bankruptcy. Any individual who opposes abortion on demand, minority preferences or any other "right" held by a so-called preferred group, will think twice before speaking out in public. Such a result makes a travesty of the First Amendment.

CONCLUSION

For these reasons, the petitioner, Dean M. Crist, respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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